FEB 2 1 1994

No. 93-1243

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

LT. JAMES L. GRACE, *et al.*,

Petitioners,

v.

HARVEY TABRON,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

Carl A. Solano
Schnader, Harrison, Segal & Lewis
Suite 3600, 1600 Market Street
Philadelphia, PA 19103
(215) 751-2202
Attorney for Respondent
Harvey Tabron

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 8

I. THE COURTS OF APPEALS ARE NOT IN CONFLICT REGARDING THE STANDARDS FOR DECIDING WHEN TO APPOINT COUNSEL UNDER SECTION 1915(d) 8

II. THE DECISION BELOW REQUIRING CAREFUL CONSIDERATION OF RELEVANT FACTORS WHEN EXERCISING DISCRETION UNDER SECTION 1915(d) WAS CORRECT AND DOES NOT REQUIRE FURTHER REVIEW 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases *Page*

Cookish v. Cunningham, 787 F.2d 1 (1st Cir. 1986) 11

Froudi v. United States, 23 Cl. Ct. 328 (1991). 13

Hahn v. McLey, 737 F.2d 771 (8th Cir. 1984) 8-10

Hodge v. Police Officers, 802 F.2d 58 (2d Cir. 1986) 6, 8-9

Holt v. Ford, 862 F.2d 850 (11th Cir. 1989) 11

Hudson v. Hardy, 412 F.2d 1091 (D.C. Cir. 1968) 12

In re Lane, 801 F.2d 1040 (8th Cir. 1986) 10

Johnson v. Williams, 788 F.2d 1319 (8th Cir. 1986) 10

Lariscey v. United States, 861 F.2d 1267 (Fed. Cir. 1988) 13

Lavado v. Keohane, 992 F.2d 601 (6th Cir. 1993) 11

Cases	Page
Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981)	6, 8-13
Poindexter v. FBI, 737 F.2d 1173 (D.C. Cir. 1984)	12-13
Ray v. Robinson, 640 F.2d 474 (3d Cir. 1981)	6
Santana v. Chandler, 961 F.2d 514 (5th Cir. 1992)	10
Smith-Bey v. Petsock, 741 F.2d 22 (3d Cir. 1984)	12
Ulmer v. Chancellor, 691 F.2d 209 (5th Cir. 1982)	10-12
United States ex rel. Gardner v. Madden, 352 F.2d 792 (9th Cir. 1965)	11
United States v. 30.64 Acres of Land, 795 F.2d 796 (9th Cir. 1986)	11
Weller v. Dickson, 314 F.2d 598 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963)	11
Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984)	11-12
Whitley v. Albers, 475 U.S. 312 (1986)	17

Cases *Page*

Wilborn v. Escalderon, 789 F.2d 1328 (9th Cir. 1986) 12

Williams v. Meese, 926 F.2d 994 (10th Cir. 1991) 12

Wilson v. Seiter, 501 U.S. ____, 111 S. Ct. 2321 (1991) 17

Constitutional Provisions and Statutes

Constitution of the United States
Eighth Amendment 15-16

Judicial Code, 28 U.S.C. § 1915 . . . . . *passim*

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993
No. 93-1243

LT. JAMES L. GRACE, *et al.*,

Petitioners,

v.

HARVEY TABRON,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent Harvey Tabron respectfully submits that the petition for a writ of certiorari should be denied. The decision by the Court of Appeals for the Third Circuit correctly recognized the discretion that is vested in a district court to appoint counsel under the Judicial Code, 28 U.S.C. § 1915(d), and is in accord with that of the other courts of appeals that have identified factors relevant to a district court's exercise of that discretion. Accordingly, petitioners have raised no question that merits review by this Court.

STATEMENT OF THE CASE

On March 22, 1989, respondent Tabron, an inmate at a Pennsylvania correctional institution, was brutally attacked by another inmate, Charles Evans, who used a makeshift knife to lacerate Tabron's neck, face, and jaw, requiring 32 sutures. Tabron brought this civil rights action against petitioners, eight officials at the correctional institution, for violations of his constitutional rights because, among other reasons, they failed to protect him from that assault. Tabron presented evidence that two of the petitioners, Lt. James Grace and Sgt. Francis Maskulyak, were present during the evening of March 21 and the morning of March 22, 1989, when Evans repeatedly threatened Tabron with bodily harm, and that, despite those threats, they took no actions to prevent the attack. Tabron also presented evidence that a third petitioner, Officer Mary Perkins, was present during the attack, but deliberately chose not to intercede. Tabron's claims against the other petitioners dealt with their investigation of the assault and administration of discipline. App. 14a-18a.

Tabron brought his action *pro se* in the United States District Court for the Middle District of Pennsylvania, and he was permitted to proceed *in forma pauperis*. *See* 28 U.S.C. § 1915. As one of his first acts in the litigation, Tabron asked the magistrate judge to whom the case was assigned to appoint counsel on his behalf under subsection (d) of that statute because he did not have the legal education or experience necessary to present his case and needed an attorney to assist him with discovery. Petitioners did not oppose Tabron's motion. Nevertheless, the magistrate judge denied it, stating that, "Non-compensated counsel can be appointed by the court in civil rights cases only when exceptional circumstances exist" and "No such circumstances

exist in this case." App. 18a-20a, 115a. Tabron then endeavored to handle the case on his own.

As the Court of Appeals observed (App. 20a), "During discovery, Tabron's lack of resources and his unfamiliarity with discovery rules and tactics put him at a significant disadvantage." Petitioners deposed Tabron, Evans, and some inmate eyewitnesses. Although Tabron attended the depositions, he was unable to afford copies of the transcripts. Because he could not afford to take his own depositions, Tabron sought written discovery, but petitioners returned his interrogatories unanswered because Tabron had not served them within the six-month discovery deadline imposed by the court's local rules. Tabron moved to extend the discovery deadline, but the court did not act on his motion, apparently because he failed to file a supporting brief that was required under another of the court's local rules. App. 20a-21a.

After moving again, Tabron eventually obtained an extension of the discovery deadline, and he immediately served interrogatories and document requests. In all, Tabron served 146 interrogatories, but most of these were in discrete groups addressed separately to each of the eight defendant-petitioners, and the largest group addressed to any one defendant, Grace, consisted of just 22 questions. Tabron did not address his first 43 interrogatories to any specifically identified defendant, however, and he planned instead for those questions to be answered by whatever defendant had sufficient knowledge to do so. Because, under still another local discovery rule, one party may not serve more than 40 interrogatories on each other party without leave of court, petitioners took advantage of this sequence to count the first 40 of Tabron's questions as applying to all eight defendants, and they invoked the local rule to refuse to answer any questions beyond that number, including the questions

specifically addressed to each defendant individually. App. 21a-22a, 87a-89a. Petitioners could not have employed this gambit if Tabron had organized the interrogatories to ask the specifically addressed questions first.

Of those 40 interrogatories to which petitioners did respond, petitioners answered seven, objected to 24, and responded to the remaining nine by stating that they were "still gathering information . . . and will supplement this response." They never supplied supplementary responses to those questions. App. 21a-22a.

In February 1991, the magistrate judge ordered that all dispositive motions be filed within 60 days. Upon receiving that order, Tabron, who had been awaiting supplementation of petitioners' interrogatory responses and provision of documents they had promised in response to his document requests, filed motions to compel discovery. Petitioners responded to the discovery motions and, before the court ruled on those motions, filed their own motion for summary judgment. In affidavits supporting their motion, petitioners denied that Grace and Maskulyak had overheard Evans threaten Tabron and that Perkins had witnessed Evans' attack on Tabron. Without a ruling on his discovery motions, Tabron was unable to respond to the summary judgment motion with the discovery information he had requested. Instead, he filed a response that relied on his own affidavit that disputed petitioners' denials, and he stated that he would provide other information supporting his opposition to summary judgment when his discovery motions were granted. Though Tabron did not possess any deposition transcripts, his response cited to deposition testimony either from memory or by referring to pages of transcripts that he had been permitted to inspect. App. 21a-24a.

On September 18, 1991, the magistrate judge filed a report and recommendation that Tabron's discovery motions be denied and that petitioners' motion for summary judgment be granted. He recommended that each of petitioners' objections to Tabron's interrogatories be sustained because the questions sought information not relevant to the case or violated the 40-interrogatory limit in the court's local rules. On the motion for summary judgment, he credited the petitioners' affidavits and concluded that Tabron's opposing affidavit was insufficient to create a genuine issue of material fact with respect to whether Grace or Maskulyak heard Evans threaten Tabron because Tabron could not possess personal knowledge of what those defendants heard. The magistrate judge acknowledged that there was a dispute regarding whether Perkins had witnessed Evans' attack on Tabron and refused to intercede, but held, as a matter of law, that such a refusal would not be actionable. App. 72a-114a.

On review of the magistrate judge's report and recommendation, the district court concluded that petitioners should have been required to respond to two of Tabron's interrogatories inquiring about violent behavior of Evans, and it ordered those responses. App. 66a-71a. With that one exception, the district court adopted the magistrate judge's report and recommendation in its entirety, and it entered summary judgment in favor of petitioners. App. 64a-65a.

Tabron appealed to the Court of Appeals for the Third Circuit, which appointed the undersigned to act as his counsel. After briefing and argument, the Court of Appeals reversed, holding that the magistrate judge had applied the wrong standard in refusing Tabron's request for appointed counsel. While the magistrate judge had stated that counsel could be appointed "only when exceptional circumstances exist," controlling Third Circuit case law established that a

district court has discretionary authority to appoint counsel and that there is no single "general standard" determining when such an appointment can be made. App. at 33a-34a, *citing Ray v. Robinson*, 640 F.2d 474 (3d Cir. 1981).

Petitioners characterize the court of appeals' decision as creating some brand new "ten-prong standard" for appointment of counsel. Pet. at 8. In fact, however, the court surveyed federal case law -- particularly, *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981), and *Hodge v. Police Officers*, 802 F.2d 58 (2d Cir. 1986) -- to ascertain what factors and criteria should guide a district court's exercise of discretion in deciding whether to appoint counsel (App. 39a-52a), and it adopted this non-exhaustive list of factors from those decisions:

- Whether the claim has some merit in fact and law -- an essential prerequisite, since the court should not consider other factors without first determining that the claim has arguable merit. App. 40a-41a.

- The plaintiff's ability to present his or her case in light of his or her education, literacy, prior work experience, prior litigation experience, ability to understand English, and ability to act despite confinement in prison. App. 41a-42a.

- The difficulty or complexity of the legal questions presented. App. 43a.

- The degree to which factual investigation may be required and the ability of the plaintiff to pursue such an investigation in light of any restraints resulting from prison confinement and the complexity of applicable discovery rules. App. 43a-44a.

- The need to resolve credibility issues through presentation of evidence and cross-examination, and the need to present expert testimony. App. 44a-45a.

- The ability of the plaintiff to retain his or her own counsel without appointment by the court, and the availability of counsel for appointment. App. 46a-50a.

The court held that it was necessary to remand the case to the district court for reconsideration of the decision whether to appoint counsel because the magistrate judge had applied the wrong standard in making that decision and had given no other explanation of why he denied counsel, thus preventing review under the proper standard. App. 52a. Accordingly, the court vacated the district court's judgment and remanded for further proceedings. App. 62a-63a.

Petitioners' request for rehearing was denied (App. 1a-2a), and they then asked this Court for a writ of certiorari. Tabron is responding to the petition for certiorari by his counsel appointed in the court of appeals. If the Court grants certiorari, Tabron shall move to proceed further in this Court *in forma pauperis*.

REASONS FOR DENYING THE WRIT

I. THE COURTS OF APPEALS ARE NOT IN CONFLICT REGARDING THE STANDARDS FOR DECIDING WHEN TO APPOINT COUNSEL UNDER SECTION 1915(d).

Petitioners argue that this Court needs to review this case to decide the standards under which counsel may be appointed under Section 1915(d) because this issue arises frequently in the district courts and, according to petitioners, the courts of appeals are in conflict on how the issue should be decided. Petitioners divide the courts of appeals' decisions into four groups. First, there is the decision below by the Third Circuit, which, they say, adopted a brand new "ten-prong standard" that differs from the standards employed by all other courts of appeals. Pet. at 8, 11-14. The second group applies a "'middle ground' approach" of the Seventh Circuit in *Maclin v. Feake, supra,* 650 F.2d 885, and the Second Circuit in *Hodge, supra,* 802 F.2d 56. Pet. at 13-14. Third, there is the case law in the Eight Circuit, which, according to petitioners, "appears to have its own standard that requires appointment if a 'colorable' claim is presented." Pet. at 14, *citing Hahn v. McLey*, 737 F.2d 771 (8th Cir. 1984) (per curiam). Finally, there is what petitioners characterize as a majority rule requiring "exceptional circumstances" as a prerequisite to appointment of counsel. Pet. at 7, 12. According to petitioners, the First, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits follow this "majority" view. *Id.* (citing cases).

In fact, however, review of the decisions discloses that, while different courts of appeals use different labels to

describe their approach to appointment of counsel, the analysis employed by each court is the same. Therefore, there is no substantive conflict among the courts of appeals on this issue at all.

First, there is no substantial difference between the analytical framework described by the Third Circuit in the decision below and that described by the Seventh and Second Circuits in their *Maclin* and *Hodge* decisions. In fact, the Third Circuit drew heavily on *Maclin* and *Hodge* in identifying the factors that it concluded are relevant to a determination whether to appoint counsel, citing both cases frequently. App. 39a-54a. In *Maclin*, 650 F.2d at 886-89, the Seventh Circuit emphasized that a district court "has broad discretion to appoint counsel" under Section 1915(d) and that "[t]here are few hard and fast rules governing appointment of counsel." The Court listed factors that should be considered in making this decision, including whether the litigant's claim has merit, the indigent is in a position to investigate factual issues, the testimony is in conflict and presents credibility issues, the indigent is competent and capable of presenting his or her case, and the case presents complex legal issues. *Id.* In *Hodge*, 802 F.2d at 61-62, the court repeated these same factors. Thus, although the decision below contains greater detail about some of these factors, it sets forth essentially the same analysis as that in *Maclin* and *Hodge*, and there is no conflict among these decisions.

Second, contrary to petitioners' argument, there is nothing unique about the Eighth Circuit's approach to this issue that places that court in a special category for purposes of dividing the circuits. Petitioners rely on the Eighth Circuit's per curiam statement in *Hahn v. McLey, supra,* 737 F.2d at 774, that a court should appoint counsel upon request

"when an indigent presents a colorable civil claim to a court." The Eighth Circuit subsequently explained, however, that this statement merely "express[ed] in abbreviated fashion" the court's requirement that no further inquiry into the propriety of appointing counsel should be made until a court first determines whether an indigent plaintiff has established a *prima faca* case that, if proven, would entitle him or her to relief. Once the plaintiff makes that showing, the court then should inquire into several other factors relevant to the need for appointment. *In re Lane*, 801 F.2d 1040, 1043-44 (8th Cir. 1986). The additional factors that the Eighth Circuit considers appropriate for this inquiry are the same as those identified in *Maclin* -- factual complexity, ability of the indigent to investigate the facts, the existence of conflicting testimony, the competence and ability of the indigent to present his claim, and the complexity of the legal issues. *Johnson v. Williams*, 788 F.2d 1319, 1322-23 (8th Cir. 1986). Thus, the Eighth Circuit is in full accord with the Third, Seventh, and Second circuits on this issue.

This leaves the remaining category identified by petitioners -- the purported "majority" of federal appellate courts that follows an "exceptional circumstances" test. But a look at the substance of these courts' decisions discloses that here too there is no disagreement. The Fifth Circuit's decisions are illustrative. The per curiam decision by that court that is cited by petitioners (Pet. at 12), *Santana v. Chandler*, 961 F.2d 514, 515 (5th Cir. 1992), does indeed say that appointment of counsel "is appropriate in a case that presents 'exceptional circumstances.'" But other Fifth Circuit case law, not cited by petitioners, explains what that sentence means. As the Fifth Circuit summarized that law in *Ulmer v. Chancellor*, 691 F.2d 209, 212-13 (5th Cir. 1982), a court "has discretion to appoint counsel if doing so would advance the proper administration of justice" and "is not required to

appoint counsel . . . unless the case presents exceptional circumstances." The factors relevant to a consideration of whether such circumstances exist include whether the case is complex, the indigent is capable of adequately presenting the case, the indigent is in a position to investigate the case adequately, the evidence will consist of conflicting testimony requiring skill in presenting evidence and cross-examination, and appointment of counsel would be a service to the indigent, the court, and other parties by sharpening the issues and assisting in a just and speedy determination -- factors taken liberally from *Maclin*. *See id.* Each of the other five circuits identified by petitioners as employing an "exceptional circumstances" test list similar factors to be considered in determining whether the test is met. *See Cookish v. Cunningham*, 787 F.2d 1, 2-3 (1st Cir. 1986); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984); *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993); *United States v. 30.64 Acres of Land*, 795 F.2d 796, 800 n.8 (9th Cir. 1986); *Holt v. Ford*, 862 F.2d 850, 853 (11th Cir. 1989).

Thus, the circuits requiring "exceptional circumstances" follow the same analysis as the other federal circuits, but under a different name. The phrase "exceptional circumstances" apparently originated in the Ninth Circuit when that court quoted a statement in a party's brief that "the privilege of proceeding in forma pauperis is a matter within the discretion of the trial court and . . . should be allowed only in exceptional circumstances." *Weller v. Dickson*, 314 F.2d 598, 600 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963). In a later case, that same court repeated the phrase in the context of appointing counsel under Section 1915(d). *United States ex rel. Gardner v. Madden*, 352 F.2d 792, 794 (9th Cir. 1965). But these decisions talked about when a court's discretionary power under Section 1915 "should" be exercised; they did not purport to declare any limit on the

exercise of that discretion. *See Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Indeed, the Fifth Circuit's statement in *Ulmer, supra,* 691 F.2d at 212, that a trial court "is not required to appoint counsel" unless exceptional circumstances are present points to the correctness of the suggestion in the opinion below (App. 38a, at n.4) that these courts use the phrase "exceptional circumstances" to describe situations in which the need to appoint counsel is so clear that failure to do so requires reversal as an abuse of discretion. *See Whisenant, supra*, at 163 ("it is an abuse of discretion to decline to appoint counsel if the case of an indigent plaintiff presents exceptional circumstances"). "Exceptional circumstances" is just a label used by these courts to describe the results of their analyses, just as the court below used its own label -- "special circumstances," a phrase borrowed from that court's earlier decision in *Smith-Bey v. Petsock*, 741 F.2d 22, 26 (3d Cir. 1984) -- to describe the framework of its analysis. App. 39a. The labels have no special significance apart from the analyses themselves.

Though not mentioned by petitioners, the remaining two regional courts of appeals are in accord with the approach to Section 1915(d) followed by all of the others. Tenth Circuit precedent recognizes that a district court has broad discretion to appoint counsel under Section 1915(d) and looks to the factors listed in *Maclin* to determine whether such discretion should be exercised. *See Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991). The District of Columbia Circuit similarly recognizes broad discretion, and, although it appears not to have had a recent occasion to consider what factors should guide exercise of that discretion under Section 1915(d), it has delineated similar factors under other statutes calling for appointment of counsel. *See Hudson v. Hardy*, 412 F.2d 1091 (D.C. Cir. 1968); *Poindexter v. FBI*, 737 F.2d

1173 (D.C. Cir. 1984) (factors under Title VII of 1964 Civil Rights Act).*

All of these authorities establish that there is no real conflict among the circuits. Although the courts use different labels to describe their analyses, the analysis in each is substantially the same. Because the circuits are not divided on this issue, this case does not require review by this Court.

---

*. The only Federal Circuit decision to address this issue, *Lariscey v. United States*, 861 F.2d 1267 (Fed. Cir. 1988), is unclear. Although the court, citing *Maclin*, recognized that appointment of counsel under Section 1915(d) is discretionary, it appeared to hold that the propriety of such an appointment depends at least in part on the type of constitutional claim that is asserted by an indigent plaintiff. *See* 861 F.2d at 1271 (citing "exceptional circumstances" cases, without explanation). The precedential value of the decision is questionable because the Claims Court, in which counsel initially was sought to be appointed, may not be a "court of the United States" as that phrase is used in Section 1915, so that there would be no authority for appointment in that court under any standard. *See id.; Froudi v. United States*, 23 Cl. Ct. 328 (1991). In these circumstances, *Lariscey* does not establish a split in the circuits, and even petitioners do not cite it for that purpose.

II. THE DECISION BELOW REQUIRING CAREFUL CONSIDERATION OF RELEVANT FACTORS WHEN EXERCISING DISCRETION UNDER SECTION 1915(d) WAS CORRECT AND DOES NOT REQUIRE FURTHER REVIEW.

The magistrate judge refused to appoint counsel in this case on the ground that such counsel "can be appointed . . . only when exceptional circumstances exist" and "[n]o such circumstances exist in this case." App. 115a. Both the court below and the parties understood this decision to mean that the magistrate judge believed he lacked discretionary power to appoint counsel for Tabron. Since Section 1915(d) explicitly says that a court "may request an attorney to represent any such person unable to employ counsel," the court below held that the magistrate judge's restrictive view of his power was incorrect as a matter of law. App. 38a-39a. Since the magistrate judge offered no other reasons for his denial of counsel and no specific discussion of factors justifying his decision, the court of appeals reversed and remanded for reconsideration of the appointment decision. App. 52a. In seeking review by this Court, petitioners appear to contend that this disposition was error and that, instead, a strict restriction should be placed on the discretionary power of district courts to appoint counsel under Section 1915(d).

The approach that petitioners appear to advocate is completely without merit. First, as the court below observed, it is contrary to the clear wording of the statute. As the court stated, "Nothing in [the statute's] clear language suggests that appointment is permissible in some limited set of circumstances." App. 38a.

Second, such an approach is unsound as a matter of policy. The decision below does no more than to identify

factors that are relevant to a district court's determination of whether or not to appoint. Petitioners point to no sound reason to circumscribe the scope of the court's inquiry into whether discretion should be exercised. Surely, an exercise of discretion should require full consideration of all information that is relevant.

Third, the approach advanced by petitioners is without precedent. As discussed above, despite petitioners' characterization of a "majority rule," all of the courts of appeals, including those that describe their approach as one requiring "exceptional circumstances," employ substantially the same analysis as that outlined by the court below. They do not restrict the factors that a district court may consider in deciding whether to exercise its discretion to appoint counsel, and, contrary to the apparent view of petitioners and the magistrate judge below, they do not place substantive limits on the discretionary appointment power.

The facts of this case make it clear that appointment of counsel to represent Tabron in the trial court certainly was within the district court's discretionary power:

-- There should be no question that Tabron has presented a colorable claim involving serious physical injuries that may have resulted from conduct by some or all of the petitioners that infringed his Eighth Amendment rights.

-- As Tabron predicted in his motion for appointment of counsel, his lack of legal education and experience and unfamiliarity with complex discovery rules hindered his ability to conduct essential factual investigation and to present his case. Indeed, the opinion below specifically acknowledged, "During discovery, Tabron's lack of resources and his unfamiliarity with discovery rules and

tactics put him at a significant disadvantage." App. 20a. Tabron could not afford to take depositions or even to pay for transcripts of depositions taken by petitioners. And the complexity of the discovery rules in the trial court stymied his efforts at written discovery -- he needed to extend a discovery deadline of which he had not been aware before he could obtain answers to the discovery requests; he needed to comply with a briefing requirement of which he was not aware before he could move to extend the discovery deadline; he needed to move to compel discovery responses that had been promised by petitioners because supplementation was not forthcoming on its own; and he needed to learn how to comply with the local court's limit on the permissible number of interrogatories to avoid a manipulation of his questions' numbering that permitted the bulk of his interrogatories to remain unanswered.

-- Since his case depended on resolution of clear conflicts in witnesses' testimony, Tabron required assistance by someone skilled in the presentation of evidence and cross-examination.

-- Tabron's case presented at least one troublesome question of law that remains unresolved: whether the alleged refusal of petitioner Perkins to intercede when she witnessed the attack on Tabron -- a claim of nonfeasance, as opposed to misfeasance through use of excessive force -- is governed by the Eighth Amendment's "deliberately indifferent" standard under *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), or the "maliciously and sadistically with the very purpose of causing harm" standard under *Whitley v. Albers*, 475 U.S. 312 (1986).

In light of these and other factors, the district court certainly had <u>discretion</u> to appoint counsel for Tabron.

Indeed, though the court below left the question open, the failure to appoint counsel in these circumstances must have been an abuse of discretion. In these circumstances, reversal and remand by the court below so that the appointment question could be resolved appropriately under the proper standard was correct, and it does not require further review by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

Carl A. Solano

Schnader, Harrison, Segal & Lewis
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
(215) 751-2202

Attorney for Respondent
Harvey Tabron

Dated: February 24, 1994.